STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF HEALTH, BOARD OF NURSING,	)	
Petitioner,	)	
vs.	)	Case No. 10-4761PL
CYNTHIA L. MCNEMAR, L.P.N.,	)	
Respondent.	)	

RECOMMENDED ORDER

On November 3, 2010, a duly-noticed hearing was held by video teleconferencing with sites in Daytona Beach and Tallahassee, Florida, before Lisa Shearer Nelson, an Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Michael G. Lawrence, Esquire
Jodi-Ann V. Johnson, Esquire
Department of Health
Prosecution Services Unit
4052 Bald Cypress Way, Bin C-65
Tallahassee, Florida 32399

For Respondent: Paul Kwilecki, Jr., Esquire
327 South Palmetto Avenue
Daytona Beach, Florida 32114

STATEMENT OF THE ISSUE

The issue to be determined is whether Respondent violated section 464.018(1)(h), Florida Statutes (2009),[1/] as alleged in the Administrative Complaint, and if so, what penalty should be imposed?

PRELIMINARY STATEMENT

On May 21, 2010, Petitioner, Department of Health (Petitioner or the Department), filed an Administrative Complaint charging Respondent, Cynthia McNemar (Respondent or Ms. McNemar), with violating section 464.018(1)(h), Florida Statutes.

Respondent disputed specific allegations in the Administrative Complaint and requested a hearing pursuant to section 120.57(1), Florida Statutes. On July 6, 2010, the Department referred the case to the Division of Administrative Hearings (Division) for assignment of an administrative law judge.

Upon referral of the case to the Division, the parties were directed, by means of an Initial Order, to confer and file a Joint Response providing information necessary to schedule the case for hearing. The parties instead filed separate responses with conflicting information. On July 19, 2010, an Order Requiring Amended Response was issued, directing the parties to confer and provide a Joint Response with the information required in the Initial Order. On July 27, 2010, the parties did so and by a Notice of Hearing dated August 2, 2010, the hearing was scheduled for September 2, 2010. On August 2, 2010, the parties filed a Joint Motion for Continuance which was granted, and the case was rescheduled for November 3, 2010.

The parties submitted a Joint Prehearing Statement that included stipulated facts which, where relevant, have been

included in the findings of fact below. Official recognition was taken of sections 20.43, 464.018, and 893.03, Florida Statutes, and of Florida Administrative Code Rules 64B9-8.005 and 64B9-8.006. At hearing, the Department presented the testimony of Respondent and Tyina Lomena, and Petitioner's Exhibits 1-5 were admitted into evidence. Respondent testified on her own behalf and Respondent's Exhibits 1-2 were also admitted.

The Department indicated at hearing that it would be ordering the transcript of the proceedings, and some of the exhibits were to be attached to the transcript for transmittal to the administrative law judge. By agreement of the parties, the proposed recommended orders were due December 5, 2010, and both submissions were timely filed. However, the transcript had not been filed, and at least one Proposed Recommended Order included references to transcript pages. After inquiry by the undersigned's assistant, a certified copy of the transcript was filed at the Division on December 30, 2010; however, the copy was incomplete. An order was issued requiring the Department to file either the original transcript or a statement that the Department did not intend for the transcript to be a part of the record of the proceedings. On January 5, 2011, the complete original Transcript of the proceedings was filed with the Division.

FINDINGS OF FACT

1. The Department of Health, Board of Nursing, is the state agency charged with the licensing and regulation of nurses in the State of Florida pursuant to section 20.42 and chapters 456 and 464, Florida Statutes.

2. At all times material to this Administrative Complaint, Respondent was employed by Maxim Healthcare Services (Maxim) in Daytona Beach, Florida.

3. On or about January 11, 2010, Maxim required Respondent to submit to an employer-ordered urine drug screen.

4. Respondent's drug screen tested positive for butalbital.

5. Butalbital is commonly prescribed for the treatment of migraine headaches. Pursuant to section 893.03(3), Florida Statutes, butalbital is a Schedule III controlled substance that has a potential for abuse, less than the substances in Schedules I and II, and has a currently accepted medical use in treatment in the United States. Abuse of Schedule III drugs may lead to moderate or low physical dependence or high psychological dependence. A brand name for butalbital is Fioricet.

6. Respondent admits taking Fioricet, and claims that the drug was prescribed to her for migraines, a long-standing problem for her, by Dr. Jerry Robinson.

7. While she claims that Dr. Robinson prescribed the Fioricet for her, she could not remember when she last saw him or when the medicine was prescribed. She testified that she last saw him either three to four years ago (Petitioner's Exhibit 4,

p. 8) or eight to nine years ago (Transcript at p. 17). She also testified that she received the prescription two to four years ago (Petitioner's Exhibit 4, p. 8), or five to six years ago (Transcript at p. 16). She did not explain how she may have received the prescription for a controlled substance without seeing the prescribing physician.

8. She did not produce the prescription for the drug, and did not present the original pill bottle which would indicate when and where it was filled, and who prescribed it. The original prescription, Respondent claimed, was for 30 to 40 pills, and she had two remaining when she took them the weekend before the drug test. Her attempts to retrieve records from the Eckerd pharmacy, where she claimed the prescription was filled, were unsuccessful because of the transfer of pharmacy records to successor pharmacies when Eckerd Drugs closed, and the subsequent purge of older records.

9. Dr. Robinson died in December of 2008. His practice was apparently taken over by Central Florida Primary Physicians, and records of his patients are maintained at this practice. Dr. Robinson's patients who still receive care at Central Florida Primary Physicians have medical records going back up to 30 years. Patient records for former patients who have not been seen in ten years or more are purged.

10. Upon inquiry, at least two different staff members at Central Florida Primary Physicians searched for medical records related to Respondent. None was found.

11. Respondent did not produce and, it is found, did not have a valid prescription for Fioricet at the time of her drug screen January 11, 2010.

12. On January 15, 2010, Respondent filled a new prescription for Fioricet written by Dr. Scolaro. Another prescription for Fioricet was written for her by someone in Dr. Scolaro's office on September 21, 2010. Neither of these prescriptions had been filled at the time Respondent tested positive for Fioricet on January 11, 2010.

CONCLUSIONS OF LAW

13. The Division of Administrative Hearings has jurisdiction over the subject matter and the parties to this action in accordance with sections 120.569 and 120.57(1), Florida Statutes (2010).

14. Petitioner is seeking to take disciplinary action against Respondent's license as a practical nurse. Because disciplinary proceedings are considered to be penal proceedings, Petitioner has the burden to prove the allegations in the Administrative Complaint by clear and convincing evidence. Dep't. of Banking and Fin. v. Osborne Stern and Co., 670 So. 2d 932 (Fla. 1996); Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987). As stated by the Supreme Court of Florida,

> Clear and convincing evidence requires that the evidence must be found to be credible; the facts to which the witnesses testify must be distinctly remembered; the testimony must be precise and lacking in confusion as to the facts in issue. The evidence must be of such a weight that it produces in the mind of the trier of fact a firm belief or conviction, without hesitancy, as to the truth of the allegations sought to be established.

In re Henson, 913 So. 2d 579, 590 (Fla. 2005), quoting Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983).

15. Moreover, disciplinary provisions such as section 464.018 must be strictly construed in favor of the licensee. Elmariah v. Dep't of Prof. Reg., 574 So. 2d 164 (Fla. 1st DCA 1990); Taylor v. Dep't of Prof. Reg., 534 So. 782, 784 (Fla. 1st DCA 1988).

16. The Administrative Complaint charges Respondent with violating section 464.018(1)(h), which makes unprofessional conduct, as defined by board rule, a basis for disciplinary action.

17. Florida Administrative Code Rule 64B9-8.005(12) provides that "unprofessional conduct" shall include "[t]esting positive for any drugs under Chapter 893, F.S., on any drug screen when the nurse does not have a prescription and legitimate medical reason for using such drug."

18. The rule requires that when a nurse tests positive for a controlled drug, he or she must have both a prescription for the drug and a legitimate medical reason for using the drug. In this case, Respondent may well suffer from migraine headaches.

Her testimony in this regard is unrefuted and credible. However, clear and convincing evidence presented at hearing indicates that she tested positive for the Schedule III drug Fioricet and that she did not present a prescription that was in force for Fioricet at the time she submitted to the drug test.

19. Although Respondent claimed that a prescription for Fioricet was issued several years ago by a physician who has since died, her testimony on this issue was not credible. The time frame in which she claimed to have seen this physician and to have obtained a prescription from him was elastic, stretching over a span of several years. It is simply difficult to believe that she was issued a prescription with 30 to 40 tablets between three and six years ago, experienced migraine headaches on a random basis during that period[2/] and still had approximately two tablets when she took the drug the weekend before her drug test. To use this one prescription over such a lengthy period of time, whether it be three years or six years, while possible, seems unlikely, especially when she has had two prescriptions for Fioricet, 40 tablets each, filled in 2010 alone. The Department has proven a violation of rule 64B9-8.005(12), and therefore a violation of section 464.018(1)(h), by clear and convincing evidence.

20. Pursuant to the mandate in section 456.079, Florida Statutes, the Board of Nursing has adopted disciplinary guidelines to "specify a meaningful range of designated penalties

based upon the severity and repetition of specific offenses." § 456.079(2), Fla. Stat. For a first-time violation of section 464.018(1)(h), the minimum penalty is a $50 fine, a reprimand and probation, and continuing education. The maximum penalty, without resort to mitigating or aggravating factors, is a $150 fine, a reprimand, and suspension followed by probation. Fla. Admin. Code R. 64B9-8.006(3)(iii).

21. Although listed for a separate statutory violation, rule 64B9-8.006(3)(ff) provides that for "testing positive for any drug, as defined in Section 112.0455, F.S., on any confirmed preemployment or employer-ordered drug screening when the practitioner does not have a lawful prescription and legitimate medical reason for using such drug," the minimum penalty for a first-time offense is a $50 fine, IPN evaluation, and probation, and the maximum penalty is a denial of certification or $100 fine, IPN evaluation, and suspension to be followed by a term of probation.

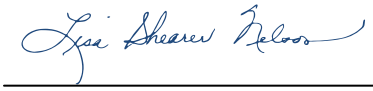
22. The Department recommends that Respondent be reprimanded, pay a $250 fine, and submit to an IPN evaluation. Respondent recommends that the charges be dismissed. No evidence of aggravating or mitigating factors was presented.

RECOMMENDATION

Upon consideration of the facts found and conclusions of law reached, it is

RECOMMENDED that the Florida Board of Nursing enter a Final Order finding that Respondent has committed unprofessional conduct in violation of section 464.018(1)(h), Florida Statutes, as defined in Florida Administrative Code Rule 64B9-8.005(12). It is further recommended that Respondent be reprimanded, fined $100, and be placed on probation for one year. As a condition of probation, it is recommended that the Board require an IPN evaluation.

DONE AND ENTERED this 14th day of January, 2011, in Tallahassee, Leon County, Florida.



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Filed with the Clerk of the
Division of Administrative Hearings
this 14th day of January, 2011.

ENDNOTES

[1/] All references to the Florida Statutes are to the 2009 codification unless otherwise specified.

[2/] When asked at hearing how often she had migraine headaches, Respondent replied, "It varies. It depends on my stress level. Sometimes I have them for three days straight; sometimes once a month; sometimes it could be months. You know, I mean, I've gone years without having a migraine, too." Her answer to the same question at deposition was similar: "It varies. Sometimes I don't have a migraine for several months. Sometimes I have them for three days in a row. I have one now."

COPIES FURNISHED:

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this recommended order. Any exceptions to this recommended order should be filed with the agency that will issue the final order in this case.